# REFLECTIONS ON THE JUDICIAL APPROACH IN ARBITRATION MATTERS CONCERNING GOVERNMENT AND PUBLIC SECTOR ENTERPRISES

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## Abstract

*This article delves into the disputes involving the government, emanating from arbitration proceedings. The focus of the article involves the Arbitration Act of 1940 and the Arbitration and Conciliation Act of 1996. Various Supreme Court and High Court judgments covering both these Acts and the modalities of the judgments have been discussed and analysed, with a focus on the evolution of the law to its present footing. The article also has a key focus on the types of challenges available under the Act of 1940 and the development of the law via judicial decisions and their incorporation in the Act of 1996 and its further amendments. The key facets under this area are the interpretation of arbitral agreements, challenges and the jurisdiction of the Court via different mechanisms.*

## I. INTRODUCTION

*"Peace in lis is essence of arbitration"*

- Justice M.S. Parikh**

When parties agree to settle their dispute through arbitration, and choose their arbitrator "*they seek to sway away from the procedural niceties and delays inherent in litigation, and aim to undergo a comparatively party-centric, efficacious, confidential, and fairly flexible process.*"[1] The Arbitration and Conciliation Act, 1996, ["**A & C Act**"] based on the United Nations Commission on International Trade Law ["**UNCITRAL**"] Model Law lays down the legal framework to help parties achieve the aforementioned objectives by laying down the principles of party autonomy and minimum judicial intervention amongst others. However, in my opinion, the doctrine of minimum judicial intervention is merely lip service as litigations in this sphere of law have increased manifold primarily because of the expanding functions of the government and its instrumentalities.

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[1] Kaushal J. Thaker, *Glimpses and Gleaning of Alternative Disputes Redressal Mechanism in India: An Overview* in CHIRAG BALYAN AND YASHRAJ SAMANT, COMMERCIAL ARBITRATION: INTERNATIONAL TRENDS AND PRACTICES (2021) at 9.

The A & C Act has repealed the Arbitration Act of 1940,[2] along with the Acts of 1937[3] and 1961,[4] and aims to consolidate and define laws relating to domestic and international arbitration.

Interestingly, there are still pending claims or litigations under the 1940 Act and the 1961 Act. The erstwhile 1940 Arbitration Act mainly had provisions concerning post-arbitral challenges and very few pre-arbitral or during-the-proceedings challenges. In the aftermath of the A&C Act, the courts are approached at all stages, even for the appointment of arbitrators. Justice D.A. Desai in *Ramji Dayawala and Sons (P) Ltd.* v. *Invest Import*[5] expressed the anguish of the court and lamented:

> "Arbitration being a mode of resolution of disputes by a judge of the choice of the parties was considered preferable to adjudication of disputes by court. If expeditious, less expensive resolution of disputes by a judge of choice of the parties was the consummation devoutly to be wished through arbitration, experience shows and this case illustrates that the hope is wholly belied because in words of Edmond Davis J in Prince V Miller[6] these may be disastrous proceedings."

Again, within one year, the Apex Court in *Guru Nanak Foundation* v. *Rattan Singh & Sons*[7] expressed the anguish of the Court over the 1940 Act in the following words: "*the way in which the proceedings under the Act are conducted and without an exception challenged in Courts has made lawyers laugh and legal philosophers weep*."[8]

This paper, based on a survey of judicial decisions, would demonstrate that Justice Desai's remarks which were made in the context of the 1940 Act are still relevant.

In this paper, an effort is made to draw an analysis of decisions under both, the 1940 Act and the A & C Act, as the courts still decide matters under both the legislations. This paper is an explorative reconnaissance of this branch of the justice delivery system. It examines the judgments of Indian Courts primarily involving the government and the public sector enterprises.

[2] The Arbitration and Conciliation Act, 1940, now repealed.
[3] The Arbitration [Protocol and Convention] Act, 1937.
[4] The Foreign Awards [Recognition and Enforcement] Act, 1961.
[5] Ramji Dayawala and Sons (P) Ltd. v. Invest Import, (1981) 1 SCC 80.
[6] Prince v. Miller (1066)1 WLR 1235.
[7] Guru Nanak Foundation v. Rattan Singh & Sons, (1981) 4 SCC 634.
[8] *Id*, ¶1.

## II. ROLE OF INDIAN COURTS IN ARBITRATION MATTERS CONCERNING GOVERNMENT OR PUBLIC SECTOR ENTERPRISE

### A. No Preferential Treatment to Government under the A&C Act

The Apex Court in *Pam Developments (P) Ltd.* v. *State of West Bengal*[9] held that the A & C Act is a special Act that provides for quick resolution of disputes between the parties and Section 18 of the A & C Act makes it clear that the parties shall be treated equally.[10] The Court held that "*there cannot be any special treatment given to the Government as a party.*"[11] The court noted that while it is true that the Code of Civil Procedure, 1908 ["**CPC**"] provides for a differential treatment to the Government in certain cases [like under Section 80 of CPC], the same is not applicable while considering a case against the Government under the A&C Act.[12] In this light, the Apex Court held that the money decree can't automatically stay only because it was passed against the government.

### B. Computation of Period of Limitation in Arbitral Matters

This part discusses various judgments of the Indian courts where principles pertaining to the limitation period in the context of India arbitration law are laid down.

The Apex Court in *State of Goa* v. *Western Builders,*[13] held that commercial disputes should be disposed of quickly so that the country's economic progress can be expedited. In *Union of India* v. *Tecco Trichy Engineers & Contractors,*[14] a three-judge bench of the Supreme Court of India ["**SCI**"] held that the period of limitation for filing an application under section 34 would commence only after a valid delivery of the award takes place under section 31(5) of the Act. On the issue of the limitation period for challenging the award, the Apex Court while relying on Section 14 of the Limitation Act held that time to challenge the award starts running from the date on which signed copy of the award is delivered to the party making application for setting it aside.[15] The Court further held that Section 14 of the Limitation Act, 1963 applies to an application made under the A&C Act.

In *Union of* India v. *Popular Construction,*[16] the Court held that Section 5 of the Limitation Act, 1963 would not apply to applications filed under Section 34 of the Act and therefore, the issue of sufficiency of the cause for the delay can't be considered. In *Dakshin Haryana Bijli Vitran Nigam*

[9] Pam Developments (P) Ltd. v. State of West Bengal, (2019) 8 SCC 112.
[10] *Id*, ¶24.
[11] *Id*.
[12] *Id*, ¶¶24, 25.
[13] State of Goa v. Western Builders, (2006) 6 SCC 239.
[14] Union of India v. Tecco Trichy Engineers & Contractors, (2005) 4 SCC 239.
[15] State of Maharashtra v. M/s. Ark Builders Pvt. Ltd, (2011) 4 SCC 616.
[16] Union of India v. Popular Construction, (2001) 8 SCC 470.

*Ltd.* v. *M/S Navigant Technologies Pvt. Ltd,*[17] the issue before the SCI was whether the limitation period to challenge the award shall be computed from the date of draft award or the date of the signed award. The Court after relying on various authorities held that it shall be calculated from the date of the signed award. The Court also noted that a dissenting opinion is not an award for the purpose of computing the limitation period. The dissenting opinion must be pronounced contemporaneously with the majority award.

The Apex Court in *Bharat Sanchar Nigam Ltd. & Anr.* v. *M/s Nortel Networks India Pvt. Ltd*.[18] while dealing with the two issues raised in the appeal namely, (i) regarding the period of limitation for filing an application under Section 11 of the Act; and (ii) whether the Court may refuse to make the reference under Section 11 where the claims are *ex facie* time-barred,[19] held that the period of limitation for filing an application under Section 11 of the Act would be governed by Article 137 of the First Schedule of the Limitation Act, 1963. Here, reference can also be made to the decision in *Secunderabad Cantonment Board* v. *B. Ramachandraiah & Sons*[20]*,* wherein the Court held that the challenge was time-barred and referred to Article 137 of the Limitation Act, the Court held that the application filed on 6.11.2013 was *ex facie* time-barred. Going into the merits of the case, the Court noted that the demand for arbitration was made by a letter dated 7 November 2006 and reiterated in another letter dated 13 January 2007 [mentioning that the appointment of arbitrator had to be made within 30 days]. Thus, the Court held that the limitation began to run on and from 12/02/2007. Therefore, the applications under Section 11 of the A & C Act were held to be hopelessly time-barred.[21]

In *Government of Maharashtra (Water Resources Department)* v. *M/s Borse Brothers Engineers & Contractors Pvt. Ltd*.[22], the Apex Court held that a delay beyond 90 days, 30 days, or 60 days can be condoned by way of exception and not by way of rule[23] and it was in the peculiar facts and circumstances of the case where the Apex Court reviewed its earlier judgment in *N.V. International*

[17] Dakshin Haryana Bijli Vitran Nigam Ltd. v. M/S Navigant Technologies Pvt. Ltd, 2021 SCC Online SC 157.
[18] Bharat Sanchar Nigam Ltd. & Anr. v. M/s Nortel Networks India Pvt. Ltd., 2021 SCC OnLine SC 207.
[19] Livelaw News Network, Limitation Period for Filing 'Section 11' Application Seeking Appointment of Arbitrator Governed by Article 137 Limitation Act: Supreme Court, LiveLaw.in (March 10, 2021, 12:52 PM), https://www.livelaw.in/top-stories/limitation-appointment-arbitrator-article-137-supreme-court-170978.
[20] Secunderabad Cantonment Board v. B. Ramachandraiah & Sons, 2021 SCC OnLine SC 219.
[21] Vasanth Rajasekaran and Saurabh Babulkar, *Indian Arbitration Quarterly Roundup 2021* (January 2021 To March 2021), Phoenix Legal (April 14, 20221), https://www.mondaq.com/india/arbitration-dispute-resolution/1057982/indian-arbitration-quarterly-roundup-2021-january-2021-to-march-2021.
[22] Government of Maharashtra (Water Resources Department) v. M/s Borse Brothers Engineers & Contractors Pvt. Ltd, Decision Dated 19 March 2021 in Civil Appeal No. 995 Of 2021 (India).
[23] Manu Sebastian, SC Overrules 'NV International' Verdict Which Held Delay Beyond 120 Days for Arbitration Appeal Under Section 37 Can't Be Condoned, LiveLaw.in (March 19, 2021, 6:48 PM).

v. *State of Assam*[24] and *Union of India* v. *Varindera Constructions Ltd*[25] and dismissed the appeals filed by the government of Maharashtra. Thus, in *Borse Brothers,* the Apex Court overturned its earlier decision in *NV International, c*larifying that an aggrieved party must file an appeal under Section 37 of the A & C Act within 60 days from the date of order. The Court further held that a delay in such filing appeals can be condoned by the appellate court, however, such condonation must be granted only by way of exception and is permissible if the delay is "short".[26]

C. Power of Appellate Courts to Interfere in Arbitral Awards

The Apex Court while interpreting the 1940 Act, held that the correctness of the award on merit cannot be examined by courts. In a five-decade-old decision in the case of *Uttar Pradesh Co-Operative Federation Ltd.* v. *Sunder Bros, Delhi*[27], which is followed even today and which the author considers to be laying a very sound foundation to obliterate delays and flimsy objections, the SCI held as under:

> "It is well established that where the discretion vested in the Court under Sec. 34 of the Indian Arbitration Act has been exercised by the lower court, the appellant court should be slow to interfere with the exercise of that discretion. In dealing with the matter raised before it at the appellant stage, the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. As is often said, it is ordinarily not open to the appellate court to substitute its own exercise of discretion for that of the trial judge; but if it appears to the appellate court that in exercising its discretion, the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate court to interfere with the trial court's exercise of discretion."

The Apex Court in *FCI* v. *Joginderpal Mohinderpal*[28] has held that the objection against an arbitral award can be raised only if it falls within the parameters fixed by the provisions of Section 14, and 33 of the Act, 1940. It was held that if the award is based on equity, fair play, principles of natural justice, and established practice and procedure then the award should not be interfered with. In proceedings of arbitration, there must be adherence to justice, equity, law, and fair play in action.

[24] N.V. International v. State of Assam, (2020) 2 SCC 109 (India).
[25] Union of India v. Varindera Constructions Ltd., (2020) 2 SCC 111 (India).
[26] Nishith Desai Associates, Dispute Resolution Hotline, NDA INFORMATION (April 14, 2021), https://www.nishithdesai.com/information/news-storage/news-details/newsid/6541/html/1.html.
[27] Uttar Pradesh Co-Operative Federation Ltd. v. Sunder Bros, Delhi, 1966 Supp SCR 215.
[28] FCI v. Joginderpal Mohinderpal, (1989) 2 SCC 347.

In *Puri Construction Pvt. Ltd* v. *Union of India,*[29] the Apex court held that the Court cannot decide and deny certain claims by reassessing terms of dispute and cannot hold that profit accrued shall be limited to a certain percentage only by rejecting other claims. The view in *Puri* was reiterated after a decade of the A & C Act coming into force in the case of *Rajasthan State Road Transport Corporation* v. *Indag Rubber Ltd*.[30] This shows that although the issue was well settled, the appellant took a chance and litigated the matter as far as the Apex Court, but unsuccessfully.

In *Gujarat Water Supply and Sewerage Board* v. *Unique Electors (Gujarat) Private Limited, Ahmedabad,*[31] the Court, while considering a challenge to an arbitral award considered the ambit of Sections 28, 29, 30 under the Arbitration Act, 1940, and held that:

> "[T]he arbitrator by virtue of the terms mentioned in the order of this Court had to decide which of the disputes were arbitrable and which were not. It is true that the arbitrator has not specifically stated in the award that he had to decide the question of arbitrability. The arbitrator has rested by stating that he had heard the parties on the point of arbitrability of the claim and the counter-claim. He has further stated that after 'considering all the above aspects' and 'the question of arbitrability or non-arbitrability' he had made the award on certain aspects. Reading the award along with the preamble, it appears clear that the arbitrator had decided the arbitrability and the amount he has awarded was on the points which were arbitrable. The contention that the arbitrator had not decided the question of arbitrability as a preliminary issue cannot also be sustained. A reference to the arbitrator's proceedings which were discussed in detail by the High Court in the judgment under appeal reveal that the procedure adopted by the arbitrator, i.e., that he will finally decide the matters, indicated that the parties had agreed to and the arbitrator had proceeded with the consent of the parties in deciding the issues before him and in not deciding the question of arbitrability as a separate, distinct and preliminary issue. The arbitrator has made his award beating all the aspects including the question of arbitrability in mind."

In *Hindustan Construction Co. Ltd.* v. *Governor of Orissa,*[32] the Court held that the State Government could not be permitted to challenge the jurisdiction of the Special Arbitration Tribunal after it had submitted to its jurisdiction merely because the award went against it. The Court held:

> "It hardly behooves the State Government to question the jurisdiction of the Special Tribunal at such a belated stage merely because the award was not to its liking. The State Government cannot be permitted to behave like an ordinary dishonest litigant who takes an off chance hoping to succeed and if the outcome is not to his liking to turn back and question the Special Tribunal's jurisdiction."[33]

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[29] Puri Construction Pvt. Ltd v. Union of India, (1989) 1 SCC 411.
[30] Rajasthan State Road Transport Corporation v. Indag Rubber Ltd, (2006) 7 SCC 700.
[31] Gujarat Water Supply and Sewerage Board v. Unique Electors (Gujarat) Private Limited, (1989) 1 SCC 532.
[32] Hindustan Construction Co. Ltd. v. Governor of Orissa, (1995) 3 SCC 8.
[33] *Id*, ¶7.

The SCI noted that the High Court should not have permitted such a somersault by the Government. As per the A&C Act, the challenge to the arbitral award is stricter and there are specific grounds for setting aside the awards which are enumerated under Section 34 of the A&C Act. The A&C Act has been further amended in 2015, 2019, and 2021. The 2015 Amendment to Section 34 has defined 'public policy'.

The SCI in *ONGC* v. *Saw Pipes* [34] laid down the principles for interfering in arbitral awards and emphasized the object of section 34(3) of the A&C Act. It was held by the Court that the remedy by way of a regular suit is intended to be excluded. In *Mc Dermott International Inc*. v. *Burn Standards Co. Ltd,* the Court held that courts cannot correct errors of the Arbitrators.[35] In *Steel Authority of India Ltd* v. *Gupta Brothers Steel Tubes Ltd.,*[36] it has been held that when Courts have concurrently held that the arbitrator has gone into the issues of facts thoroughly, applied their mind to the pleadings and evidence before them and the terms of the contract and then passed duly considered award and no ground for setting aside the award within the four corners of Section 30 of the 1940 Act has been made out, the Courts shall not interfere in arbitral awards.[37] In *Sumitomo Heavy Industries Ltd* v. *Oil & Natural Gas Commission of India,*[38] a similar view as hereinabove was reiterated holding that when the award was not only a plausible one but a well-reasoned award, the interference by the High Court was unnecessary and the Court restored the award of the Tribunal.

Recently in *Ssangyong Engineering & Construction* v. *N.H. Authority of India*[39], the Court held that it cannot substitute its view over that of the arbitrators. Apex Court has held that the provision aims at keeping the supervisory role of the Court at the minimum level. The decision in *Government of India* v. *Vedanta Limited [Formerly Cairn India Ltd.] and others*[40] and in *K. Marappan [Dead]* v. *Superintending Engineer T.B.P.H.L.C. Circle Anantapur*[41] [the facts are discussed separately] would show that the powers of the Court to modify the award are limited as discussed above and has opined that delay in arbitration proceedings is counterproductive to the efficiency of arbitration. The aforementioned instances show that the government was not justified in litigating where the right or the challenge was not maintainable.

[34] ONGC v. Saw Pipes, 2003 (5) SCC 705.
[35] Mc Dermott International Inc. v. Burn Standards Co. Ltd, (2006) 11 SCC 181.
[36] Steel Authority of India Ltd v. Gupta Brothers Steel Tubes Ltd, (2009) 10 SCC 631.
[37] *Id*, ¶38.
[38] Sumitomo Heavy Industries Ltd v. Oil & Natural Gas Commission of India, (2010) 11 SCC 296.
[39] Ssangyong Engineering & Construction v. N H Authority of India, (2019) 15 SCC 131.
[40] Government of India v. Vedanta Limited [Formerly Cairn India Ltd.] and others, (2020) 10 SCC 1.
[41] K. Marappan (Dead) v. Superintending Engineer T.B.P.H.L.C. Circle Anantapur, (2020) 15 SCC 401.

A classic example of this is the recent decision of the Apex Court in *Atlanta Infrastructure Ltd.* v. *Municipal Corporation of Greater Mumbai*[42] which dealt with Section 15 of the 1940 Act wherein the arbitration petition filed by Municipal Corporation, the Single Judge found the award to be in order and thus dismissed the challenge. In appeal, the Division Bench interfered with the award of the arbitrator. The Apex Court held that the arbitrator had given good reasons and there was no reason to interfere by High Court. The judgment of the High Court was set aside. The Apex Court further held that the Division Bench exceeded its bounds in interfering with the well-reasoned award of the arbitrator. The arbitrator had given good reasons stating that what had been awarded was by way of direct expenses, loss of productivity of machinery and equipment, and by way of loss of overheads and profits. The Court lowered the rate of interest by opining that interest rates have been continuously dropping and that in the interest of justice, it was of the view that both the *pendente lite* interest as well as future interest should be at a median rate of interest of 12%.

The Apex Court in *M/s Oriental Structural Engineers Private Limited* v. *State of Kerala*[43] allowed the appeal and granted a rate of interest on delayed payment. The only question to be decided was at what rate the interest should be paid. The award was sustained and the orders of both the Courts below were set aside. The decision demonstrates that the Government litigated till the High Court level and delayed the payment of interest. Here, reference can be made to the decision in *K. Marappan [Dead]* v. *Superintending Engineer T.B.P.H.L.C. Circle Anantapur*.[44] In this case, the arbitral proceedings under the 1940 Act had culminated in the year 2019. The subordinate Court had set aside the award of interest for the period from 2 April 1988 till the date of the award namely 19 August 1988, which can be said to be *pendente lite* interest. This finding was on the basis that the arbitrator had no power to award interest on amounts found due. The subordinate court was not justified in setting aside the portion awarding interest and the interest as awarded by the arbitrator was restored by the Apex Court.

The Allahabad High Court in *M/s R.N. Tandon and Sons* v. *Betwa River Board,*[45] *which* was decided on 1 August 2019 but the arbitral award was passed in 1986, held that a well-reasoned arbitral award was interfered with by the court on the ground that the finding is bad. Though the judge referred to several judgments, the judicial officer himself embarked on a fact-finding mission and appreciated facts on the basis that the arbitrator had committed an error in not assigning reasons, and relying on the decision in *Thawer Das* v. *Union of India*[46], misread the award as if there were an error apparent

[42] Atlanta Infrastructure Ltd. v. Municipal Corporation of Greater Mumbai, (2018) 15 SCC 230.
[43] M/s Oriental Structural Engineers Private Limited v. State of Kerala, 2021 SCC OnLine SC 337.
[44] *Supra* note 42.
[45] M/S R.N. Tandon And Sons v. Betwa River Board, 2019 SCC OnLine All 4966.
[46] Thawer Das v. Union of India, (1955) 2 SCR 48.

on the face of the record. The arbitral award was also based on the decision of the Apex Court in *Raipur Development Authority* v. *Chokhamal.*[47] The reasons were well assigned by the arbitrator, and thus, the judgment of the District Court reversing the arbitral award was held to be bad in the eyes of law.[48]

In *Kamrup Industrial Gases Ltd.* v. *Union of India,*[49] the case was governed by the 1940 Act and the matter was decided in 2017. In this matter, related to Sections 29, 30, 33, and 39 of the Arbitration Act, 1940, the Apex Court set aside the order of the division bench of the High court as the High Court had allowed the appeal on the ground that vital documents were not before the arbitrator. The Apex court on perusal of the documents and the award held that documents in form of evidence were produced by the appellant and were also dealt with by the arbitrator. The arbitral award was upheld and the post decretal interest at the rate of 9% was awarded to the appellant.

On 03 October 2017, the SCI in the matter of *Chittaranjan Maity* v. *Union of India*[50] reaffirmed the position that under the provisions contained in Section 31(7)(a) of the A & C Act when parties had agreed under the terms of the agreement that *pendente lite* interest shall not be payable, the Arbitrator cannot award interest between the date on which the cause of action arose till the date of the award. *In Hindustan Construction Company Limited & Anr.* v. *Union of India*[51], SCI handed down its highly-anticipated judgment in settling the issue of automatic stays on the enforcement of arbitral awards. The court struck down Section 87 of the A & C Act as being *"manifestly arbitrary"*. This was a welcome decision appearing to resolve years of uncertainty surrounding stays and enforcement of awards and the applicability of amendments for the enforcement of contracts. This decision would curb the latitude the government was taking by the automatic stay and their approach to challenge awards would be minimised as they would have to deposit the award amount. The SCI in *BGS SGS SOMA JV* v. *NHPC Ltd,*[52] where the dispute was regarding the seat of challenge post arbitral award – that whether juridical or legal seat of arbitration in an International Commercial Arbitration would be the place of arbitration as determined according to Section 20 of A&C Act, held that part I of A & C Act would have no application to international commercial arbitration held outside India, and enforcement of an award can be in accordance with provisions contained in Part II only.

In *MMTC* v. *Vedanta Ltd.,*[53] the Court under a Section 34 challenge held:

[47] Raipur Development Authority v. Chokhamal, 1989 (2) SCC 721.
[48] *Id.* ¶20.
[49] Kamrup Industrial Gases Ltd. v. Union of India, 2017 (6) SCC 707.
[50] Chittaranjan Maity v. Union of India, (2017) 9 SCC 611.
[51] Hindustan Construction Company Limited & anr. v. Union of India, 2019 SCC OnLine SC 1520.
[52] BGS SGS SOMA JV v. NHPC Ltd, (2020) 4 SCC 234.
[53] MMTC v. Vedanta Ltd, (2019) 4 SCC 163.

> "Court does not sit in appeal over the arbitral award and may interfere on merits on the limited ground provided u/s. 34(2)(b)(ii), i.e. if the award is against the public policy of India and prior to the amendments to the 1996 Act in 2015, a violation of Indian public policy, which in turn, includes a violation of the fundamental policy of Indian law, a violation of the interest of India, conflict with justice or morality, and the existence of patent illegality in the arbitral award."

The Apex court also held that award would be bad if the concept of "*fundamental policy of Indian law*" which would cover compliance with statutes, and judicial precedents, adopting a judicial approach and compliance with the principles of natural justice was contravened. The Apex Court held that the court may interfere with an arbitral award in terms of section 34(2)(b)(ii), if the findings are "*arbitrary, capricious or perverse, or when the conscience of the Court is shocked, or when the illegality is not trivial but goes to the root of the matter*".[54] The Apex Court, after considering all the facts and the decisions of arbitrators who had passed the majority award as accepted by the division bench of the High Court in the exercise of its powers under Sections 34 and 37 of the A&C Act, upheld the award holding that the dispute was covered under the agreement between the Appellant and the Respondent, and as such the dispute was governed by the arbitration clause under the said agreement. Thus, Court did not find any reason to disturb the majority award on the ground that the subject matter of the dispute was not arbitrable. *Thus, the challenge that spanned over years was in fact was not tenable.*

The disputes now raised by the parties are as to the seat of arbitration and forum of arbitration through companies incorporated in India. A recent decision, though in the realm of private companies, would be relevant for the, future and reference to *PASL Wind Solutions Private Limited* v. *GE Power Conversion India Private Limited*,[55] would be necessary.

D. Invoking Writ Jurisdiction

The SCI in *Navayuga Engineering Company* v. *Bangalore Metro Rail Corporation Limited*[56] reiterated that a High Court while exercising jurisdiction under Articles 226 and 227 should be extremely circumspect in interfering with the orders passed under the Arbitration and Conciliation Act. It further held that such inference can be made only in cases of exceptional rarity or cases which are stated to be patently lacking in inherent jurisdiction. The Court observed that despite of making this clear through the decision in *Deep Industries Ltd.* v. *ONGC*[57], High Courts are still interfering in

[54] *Id*, ¶11.
[55] PASL Wind Solutions Private Limited v. Ge Power Conversion India Private Limited, 2021 SCC OnLine SC 331.
[56] Navayuga Engineering Company v. Bangalore Metro Rail Corporation Limited, 2021 SCC OnLine SC 469.
[57] Deep Industries Ltd. v. ONGC, (2020) 15 SCC 706.

matters where writ jurisdiction need not be exercised. In *Bhaven Construction* v. *Executive Engineer Sardar Sarovar Narmada Nigam Ltd and Anr*[58] the Court has laid down the parameters when writs can be issued. The single judge refrained from exercising jurisdiction under Article 226 but the Division Bench exercised jurisdiction. This order was passed in 2015 and the decision of the Apex Court allowing appeal was decided in 2021. The litigation of 1998 has yet not attained finality as, to date, the challenge under section 34 of the A & C Act by the authority is pending.

In *State of Gujarat and Ors.* v. *Amber Builders,*[59] while allowing the appeal, the Apex Court held that writ was not the proper remedy for challenging a notice issued by the state and held that (i) the appropriate remedy was to

> "approach the arbitral tribunal constituted under the Gujarat Act since that would have jurisdiction to decide whether the notice issued by the Government was a legal notice and whether the Government was, in fact, entitled to recover any amount from the contractor. It would also be within the jurisdiction of the Tribunal to decide whether the contractor had made out a *prima facie* case for grant of interim relief."[60]

Further,

> "insofar as the powers vested in the Arbitral Tribunal in terms of the Section 17 of the A & C Act were concerned, such powers could be exercised by the Tribunal constituted under the Gujarat Act because there was no inconsistency in these two Acts as far as the grant of interim relief was concerned. This power was already vested in the tribunal under the Gujarat Act and Section 17 of the A & C Act compliments these powers and therefore it could not be said that the provisions of Section 17 of the A & C Act were inconsistent with the Gujarat Act."[61]

In *Unitech Limited & Ors.* v. *Telangana State Industrial Infrastructure Corporation (TSIIC) & Ors.,*[62] the Apex Court held that the presence of an arbitration clause does oust the jurisdiction under Article 226 of the Constitution in all cases.

### E. Litigations under Sections 9 and 11 of the A&C Act

The fact that arbitral proceedings partake appointment of a person of their choice to decide their dispute is now governed by the provisions of Section 11 which has been time and again invoked. In

[58] Bhaven Construction v. Executive Engineer Sardar Sarovar Narmada Nigam Ltd and Anr, 2021 SCC OnLine SC 8.
[59] State of Gujarat and Ors. v. Amber Builders, (2020) 2 SCC 540.
[60] *Id*, ¶ 18.
[61] *Infra* note 65, ¶21.
[62] Unitech Limited & Ors. v. Telangana State Industrial Infrastructure Corporation [TSIIC] & Ors., 2021 SCC OnLine SC 99.

*RSPL Limited Through Shri Harish Ramchandni Assistant President* v. *Simplex Infrastructure Ltd.*,[63] the Court held that the application under Section 11 was not maintainable as the court could not appoint an arbitrator and acceptance of appointment is *fait accompli* to debar the jurisdiction under Section 11(6). The appointment of a retired Judge to act as an Arbitrator being objected to by the respondent shows that Section 11 is now acting as counterproductive to the provisions of the Act. View taken by the Apex Court in *Uttarakhand Purv Sainik Kalyan Nigam Limited* v. *Northern Coal Field Limited,*[64] and *Walter Bau Arbitration Agreement, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G.* v. *Municipal Corporation of Greater Mumbai and another*[65] goes to show that litigation, now under Section 9 and 11 have also increased the burden of the Courts which requires legislative re-thinking.

The question of appointment of arbitrator and existence of arbitral dispute was decided by the Apex Court in *ONGC Mangalore Petrochemicals Ltd.* v. *Ans Construction Ltd. and Another*[66] which requires to be looked into as Apex Court refused to appoint an arbitrator. The Apex Court under the 1940 Act decided that after accepting all the bills, the arbitrator could not have been appointed, referring to the decision decided in 1993 in the case titled *P.K. Ramaiah and Company v. Chairman and Managing Director, National Thermal Power Corporation*[67]. The decision in *Ramaiah* has been followed in *Union of India* v. *Hari Singh.*[68] In *Oriental Insurance Company Ltd.* v. *Dicitex Furnishing Limited*[69], the Court decided on the scope of arbitration application. Disputes between private parties for appointment of sole arbitrator to resolve the dispute often reached up to the Apex Court. The Apex Court time and again has gone into the disputes whether they are arbitrable or not.

Recently, an issue arose before the High Court of Gujarat in the case of *SMS Infrastructure Limited* v. *Gujarat State Road Development Corporation*[70] where the petitioner requested the appointment of an arbitrator. The matter was highly contested and it was contended by the petitioner that as the respondent corporation was not notified under the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992, the Arbitration Tribunal constituted under the Arbitration Tribunal

[63] RSPL Limited Through Shri Harish Ramchandni Assistant Ive President v. Simplex Infrastructure Ltd., 2021 SCC OnLine Guj 848.
[64] Uttarakhand Purv Sainik Kalyan Nigam Limited v. Northern Coal Field Limited, (2020) 2 SCC 455.
[65] Walter Bau Arbitration Agreement, Legal Successor of the Original Contractor, Dyckerhoff and Widmann, A.G. v. Municipal Corporation of Greater Mumbai and another, (2015) 3 SCC 800.
[66] ONGC Mangalore Petrochemicals Ltd. v. Ans Construction Ltd. and Another, 2018 (3) SCC 373.
[67] P.K. Ramaiah and Company v. Chairman and Managing Director, National Thermal Power Corporation, 1994 Supp (3) SCC 126.
[68] Union of India v. Hari Singh, 2010 (15) SCC 201.
[69] Oriental Insurance Company Ltd. v. Dicitex Furnishing Limited, 2020 4 SCC 621.
[70] Infrastructure Limited v. Gujarat State Road Development Corporation, 2021(0) AIJEL HC 242780.

Act would not have jurisdiction to adjudicate the disputes between the parties. The High Court held that the Gujarat State Road Development Corporation ["**GSRDC**"] was an instrumentality of state and private arbitrator could not be appointed and the dispute was to be decided as per the 1992 Act. However, the Ahmedabad Municipal Corporation, which is a local body was held by Apex Court to not be governed by the Gujarat Public Works Contracts Disputes Arbitration Tribunal Act, 1992. The A & C Act read with the State Acts of different states has made the procedure even more cumbersome. This is clear from the aforesaid decision where organisations litigate even before the arbitration starts.

A similar situation, as was observed in the year 1981 by His Lordship Justice D.A. Desai, arose in the case of *Amway India Enterprises Limited* v. *Ravindra Nath Rao Sindhia*[71] where even before appointing an arbitrator, Amway took recourse to dispute relating to International Commercial Arbitration and contended that the Delhi High Court had no jurisdiction to appoint an arbitrator.

F. Appointment of Retired Employees of PSU's as Arbitrators

In the case of *Central Organisation for Railway Electrification* v. *ECI-SPIC-SMO-MCML*[72], the issue before the SCI was whether retired employees who have worked in the Railways are ineligible to act as arbitrators. The Court held that merely because the panel of the arbitrators are the retired employees who have worked in the Railways, does not make them ineligible to act as the arbitrators. *In M/s. Voestalpine Schienen GmbH* v. *Delhi Metro Rail Corporation Ltd.*,[73] the dispute between Delhi Metro Rail Corporation Ltd. ["**DMRC**"**]** and a German entity was related to a contract for procurement of rails for the Delhi-Metro project. The arbitration clause provided for the selection of a three-member tribunal from a DMRC maintained panel of engineers consisting of *serving or retired engineers of the 'Government Departments or of PSUs*. Nevertheless, the Court laid down two important requirements for the appointment of arbitrators from a panel maintained by a PSU/Government entity.

*First,* the panel must be 'broad based'. For example, it could contain names from other government undertakings and PSUs unconnected with the disputing parties, as well as individuals of high repute from the private sectors and the legal community; and *second*, the other party should be able to choose from the 'broad based' panel, rather than a small short-list as envisaged in the DMRC contract. Indeed, the Court struck down that portion of the arbitration clause which required DMRC to prepare a shortlist of five arbitrators. This is to dispense any apprehension of the Government picking its favourites.

[71] Amway India Enterprises Limited v. Ravindra Nath Rao Sindhia, 2021 SCC OnLine SC 171.
[72] Central Organisation for Railway Electrification v. ECI-SPIC-SMO-MCML, (2020) 14 SCC 712.
[73] M/s. Voestalpine Schienen GmbH v. Delhi Metro Rail Corporation Ltd, (2017) 4 SCC 665.

In conclusion, while there is still some uncertainty in this field, Government entities and PSUs must at least take a fresh look at the appointment process in their contracts to ensure that they comply with the Arbitration Act. Equally, parties (both, domestic and foreign) who are entering into contracts with Indian Government entities and PSUs must also be aware of the amended conflict of interest norms, to ensure that the arbitrator appointment process in their contract is enforceable.

In *Indian Oil Corp. Ltd.& Ors* v. *M/s Raja Transport (P) Ltd.*[74] the SCI found that the appointment of an 'employee' of one of the parties as an arbitrator would not on its own, raise the presumption of bias. However, the Court noted that it had the discretion to refuse the appointment of an employee of a party as arbitrator if there exists a reasonable apprehension about his impartiality or independence. In *ONGC* v. *ANS Constructions Limited and Another,*[75] the only issue which arose for the SC's consideration was whether a case had been made out by ANS Construction for referring the dispute to arbitration. ONGC primarily contended that ANS Construction failed to demonstrate that there existed a dispute regarding its claim and that the 'No Dues Certificate' was issued under duress. In this case, the respondent could not establish that there was any arbitral issue left, hence, the court refused to appoint an arbitrator.

In *United India Insurance Co. Ltd and Anr.* v. *Hyundai Engineering and Construction Co. Ltd and Ors.,*[76] the Apex Court refused to appoint an arbitrator after reading the restricted or conditional arbitration clause, whereby the liability had to be accepted before and repudiation of claim which falls in the definition of excepted category which would render arbitration agreement not capable of enforcement and, therefore, application for appointment of arbitration was rejected holding that the dispute was non-arbitrable and the suit should have been filed. In *Haryana Space Application Centre* v. *Pan India Consultants (P) Ltd.* ["**HARSAC**"], the SCI set aside the appointment of nominee arbitrator of HARSAC on the ground that the appointment was hit by section 12(5) read with the seventh schedule of the A&C Act. It is noteworthy that the *lis* between the parties was in the final stage and the award was ready to be pronounced. The issue raised before the apex court was that the tribunal couldn't pass the award despite an elapse of four years since the constitution of tribunal and therefore, the order of the District Judge and the High Court extending the mandate of the tribunal shall be set aside. The issue of ineligibility was not pleaded by the parties. The Apex Court substituted the arbitrator upon the consent of the parties.

[74] Indian Oil Corp. Ltd.& Ors v. M/S Raja Transport (P) Ltd, (2009) 8 SCC 520.
[75] ONGC v. ANS Constructions Limited and another, (2018) 3 SCC 37.
[76] United India Insurance Co. Ltd v. Hyundai Engineering and Construction Co. Ltd, (2018) 17 SCC 607.

## G. Mediation in Arbitral Proceedings

The mediator only facilitates the structured interactive process. Backlogs and delays are the major reasons to take the mediation route post arbitral awards as it is seen that matters remain pending at all stages for decades. An order to refer parties for mediation can be passed even at the stage of Section 37 of the A&C Act, if the Court feels there is an element of the settlement. This reference order of mediation can go ahead only if both parties agree to mediation. Further, if there is an agreement to this effect i.e., Mediation-Arbitration-Mediation, then as per the terms and conditions of the agreement, parties may be relegated for mediation even at the stage of Section 37 of the Act. In a case titled *Harindra Singh* v. *Union of India and another,*[77] the Allahabad High court set aside the rejection of award as it was found that respondent officers tried to play fraud by not producing the reasons assigned by the arbitrator which were summoned by the High Court and produced by the Union of India before the High Court at the appellate stage and raised an objection. It was contended in the appeal that the award was set aside on the sole ground namely that the arbitrator had not assigned reasons while passing the award. The fact was, however, that the arbitrator had assigned reasons and kept it in a sealed cover which was kept by the officers and not submitted to the Court. The appellant was aggrieved because of the deliberate mistake of the respondent and, therefore, the alternative dispute resolution method under section 89 of the Code of Civil Procedure was suggested. Here, the Court had felt that it would be better that instead of passing any stricture, the matter should be sorted out.

It would be better if, in arbitrations involving government or even involving private parties, at the stage of challenge under 34 or 37 of the Act, parties are requested to go for mediation by invoking section 89 of the CPC, of course by consent, otherwise there will be a new challenge, like that in *Afcons.*[78] It is suggested that a hybrid model can be adopted in arbitration involving private parties and the government or Public Sector Enterprises, namely mediation-arbitration-mediation which would lessen the burden to a great extent. This hybrid is a combination of two dispute redressal methods which may be developed as one, where an arbitrator is allowed to act as a mediator after he has heard the parties, try to narrow down the dispute, and facilitate in resolving it.

## H. No Litigation Amongst Limbs of Government

The Apex Court in the year 1992 decided that different limbs of Government machinery must not bring their litigation before the Court. More particularly, in *ONGC* v. *Collector of Central Excise,*[79]

[77]Harindra Singh v. Union of India and another, 2019 SCC OnLine All 4594.
[78]Afcons Infrastructure Ltd. and Anr. v. Cherian Varkey Construction Co. (P) Ltd. and Others, (2010) 8 SCC 24.
[79]O.N.G.C. v. Collector of Central Excise, (1992) Supp (2) SCC 432.

the Apex Court even went to the extent of holding that disputes between public sector undertakings and the Union of India would waste public time and money, and should not be brought before the Court. The Apex Court suggested that the dispute should be examined at the highest governmental level and be resolved there. The principle which emerged was that there should be an examination at the governmental level. A decade later, a similar view was reiterated by the Apex Court in *Chief Conservator of Forest, Govt. of A.P.* v. *Collector & Others*[80] and it went further in holding that the framers of the Constitution and Code of Civil Procedure never contemplated that two departments of a State or the Union of India would litigate in the Court of law. They must resolve their disputes to set at rest all inter-departmental controversies at the level of the Government and such matters should not be carried to a Court of law for the resolution of the controversy. The Government came out with guidelines in such matters which resulted in the creation of Permanent Machinery of Arbitrators ["**PMA**"] in the Department of Public Enterprises.[81] As per the directive, an arbitration clause was to be included in all the commercial contracts entered into by the Public Enterprises/Government Departments, etc.[82]

Recently, to make the mechanism of resolving disputes more effective and binding on the disputing parties, the government substituted PMA with a new mechanism called Administrative Mechanism for Resolution of CPSEs Disputes ["**AMRCD**"] having a two-tier structure. The A & C Act would not apply as per guidelines, and the arbitrator's award can be challenged.

i. *Tier 1:* The claimant will approach the Financial Advisor (FA) of its administrative Ministry/Department for representing the dispute before the Secretary of its administrative Ministry/Department. The Secretary of administrative Ministry/Department of claiming party will intimate the same to the Secretary of administrative Ministry/Department of the Respondent and Secretary-Dy Legal Affairs and thereafter meetings will take place in the administrative Ministry/Department of the claiming party to examine the facts and resolve the dispute on merit. The FAs of the concerned administrative Ministries/Departments will represent the issues related to the dispute in question before the above Committee. After arriving at a decision by the Committee, the Secretary of the administrative Ministry/Department of the claiming party will write down the decision and it will be signed jointly by both the Secretaries and Secretary- d/o

[80] Chief Conservator of Forest, Govt. of A.P. v. Collector & Others, (2003) 3 SCC 472.
[81] *See* Department of Public Enterprises, Government of India, *Settlement of Commercial Disputes between Public Sector Enterprises inter se and Public Sector Enterprise(s) and Government Department(s) through Permanent Machinery of Arbitrators (PMA) in the Department of Public Enterprises (*DPE O.M. No. DPE/4(10)/2001-PMA-GL-I dated 22nd January, 2004*)*, https://dpe.gov.in/sites/default/files/Guideline-260.pdf
[82] *Id*.

Legal Affairs. A copy of the decision will be communicated by the Secretary of the administrative Ministry/Department of the claiming party to each party to the dispute for implementation. The decision must be rendered within three months from the date of reference from the aggrieved party.

ii. *Tier 2:* Any party aggrieved with the decision of the Committee at the First tier may prefer an appeal before the Cabinet Secretary at the Second tier within 15 days from the date of receipt of the decision of the Committee at the First tier, through its administrative Ministry/Department, whose decision will be final and binding on all concerned.

AMRCD will apply in the "*event of any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts inter se and also between CPSEs and Government Departments/Organizations (excluding disputes concerning Railways, Income Tax, Customs & Excise Departments).*"[83] The Apex court again in *MTNL* v. *Canara Bank*[84] directed that when AMRCD has been set up, the disputes should be settled through AMRCD and if AMRCD cannot settle the dispute then such disputes should be resolved through arbitration proceedings. The pendency of such matters of Govt./ PSUs *inter se* should first be resolved by such methods.

## III. CONCLUSION

It would not be out of place to mention what the Malimath Committee Report of 2003[85] has stated. The report begins with Andre Gide's maxim "*everything has been said already, but as no one listens, we must always begin again*".[86] This applies to arbitration jurisprudence also.

From the above discussion of the 1940 Act, the A&C Act, the subsequent amendments, and other alternative dispute redressal methods, it can be asserted that the technique of dispute resolution is not static. The crises of judicial delay, judicial arrears, high litigation costs, and the complicated nature of lawsuits evolved the need for arbitration. But, despite the doctrine of minimum judicial intervention, the analysis of the above cases would show that the disputes covered by arbitration agreements are coming to the court at every stage. The wide economic activities in which the State has been involved means that State or its instrumentalities are one of the parties to such dispute. The

[83] F. No. 4(1)/2013-DPE(GM)/FTS-1835, Government of India Ministry of Heavy Industries & Public Enterprises, Department of Public Enterprises. https://dpe.gov.in/sites/default/files/PMA_Guideline_1835-22-05-2018.pdf

[84] MTNL v. Canara Bank, (2019) 10 SCC 32.

[85] Committee on Reforms of Criminal Justice System, Government of India, Ministry of Home Affairs, March 2003, https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

[86] *Id*.

recalcitrant attitude of the State in litigating with the citizens was condemned by Justice Krishna Iyer in *State of Punjab* v. *M/s Geeta Iron and Brass Works Ltd.*[87] The State, in order to avoid litigation amongst its limbs, has rightly implemented the AMRCD scheme. Similarly, in its dispute with citizens, it shall encourage the use of alternative methods such as mediation. Indeed, *"State should act as a model litigant"*.[88] The author would add that the State should also act as a model 'problem solver'. By incurring wasteful litigative expenditure, State instead acts as a harbinger of problems for the justice delivery mechanism. The author has carried the reconnaissance of all the above judicial decisions in the hope that the repeated cries of the justice system stumbling underneath arrears of cases are heard for once.

[87] State of Punjab v. M/s Geeta Iron and Brass Works Ltd (1978) 1 SCC 68.
[88] Popatrao V Patil v. The State of Maharashtra, 2020 SCC OnLine SC 291, ¶ 9.